tion that his reports were so unreliable as not to be worthy of reliance by anyone except the one party who contracted for the service. Somewhere a line must be drawn. It is not every casual statement that should render the maker liable if its incorrectness leads another to harm. See Judge Smith's interesting article on "Liability for Negligent Language," 14 HARV. L. REV. 184. But where a supposed expert makes a statement upon which he knows others will act, and damage ensues because the statement was carelessly made, it is hard to see why a defense of lack of privity of contract should shield the maker.

The instant case marks a step forward. Not only does it make for logical consistency in the law of torts; it helps to bring the law on this point into harmony with the facts of life. Here, it would seem, philosophy and sociology speak with the same voice. (CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, Lecture 2.) Coming as it does from one of our strongest and most eminent courts, the decision should have its effect on the law.

H. F. G.

THE BURDEN ON PARTICULAR DEFENSES IN CRIMINAL CASES.—If it needs be that excuses be given for further discussion of this hoary question of burden of proof, they may be found in the fact that courts provoke it by doing such unreasonable things. In *State v. Morrison* (S. C.), 113 S. E. 304, it is held that the burden of proof is on defendant to satisfy the jury that he acted in self-defense, and that if there is not a preponderance of the evidence in favor of the defendant on this issue, and in consequence he fails in this defense, yet that such evidence may be considered in determining whether the guilt of defendant is proven beyond a reasonable doubt. The case illustrates well the difficulties courts fall into when burdens are put on defendants in criminal cases which the recognition of fundamental principles would not permit.

Logically, the plea of not guilty puts the state to the proof of every fact essential to the guilt of defendant of the crime charged, and there is no such legal concept as an affirmative defense in a criminal case. Unquestionably, the state may say that there is, as it may say that the defendant must prove himself innocent rather than that the state shall show him guilty; and some courts have said as much, but not without disregarding our fundamental rule of criminal jurisprudence, that there can be no conviction where there is reasonable doubt of guilt.

The instruction in the case under discussion allowed the jury to convict the defendant, though it should find that there was as much evidence tending to prove that he acted in self-defense as there was that he acted willfully and maliciously. In other words, the jury was allowed to convict, though it could not say whether defendant was guilty or not, whether he acted from a motive which the law approves or from one it condemns. But having so dangled the noose over defendant's head, the court goes naively on and tells the jury that if the evidence should fall short of satisfying it that defendant acted in self-defense it may, nevertheless, use the evidence bearing on this issue to aid in determining whether there is rea-

sonable doubt of his guilt; that evidence which does not satisfy that defendant acted in self-defense may defeat a conviction because it raises a reasonable doubt of guilt. Of what avail is it to say to a jury that it cannot acquit defendant on the ground that he acted in self-defense, unless there is a preponderance of evidence tending to show that he did, if in the next breath the jury is told that if there be a reasonable doubt as to whether he willfully, deliberately and with malice aforethought did kill and slay deceased, he must be acquitted. A killing in defense of one's person is not willful, is not premeditated, is not malicious. It is lawful. A killing in self-defense is the antithesis of a killing with malice. If there is reasonable doubt of whether the killing was malicious there is reasonable doubt of guilt, whether that reasonable doubt is created with evidence tending to show the act to have been in self-defense or accidental, that defendant was incompetent, that it was B and not A who was killed, that it was C and not defendant who did the killing, or to establish an alibi for defendant, or any other fact which negates guilt.

The court is quite right in saying, therefore, as in effect it does, that a reasonable doubt as to whether defendant's act was in defense of himself is a reasonable doubt of guilt. But it goes without argument that a less weight of evidence than that which preponderates may create a reasonable doubt. If this be true, of what consequence to say that defendant cannot prevail except he produce a preponderance of evidence upon this issue of self-defense, that of competency, accident, mistaken identity, or any other? Does it serve any other purpose than to confuse the jury, more often confounded than not, in its efforts to learn the law of a case from a single recitation of it from the bench.

Jurisdictions, and sometimes cases in the same jurisdiction (Massachusetts is a notable illustration), are in hopeless conflict on this question of whether there is a defense in a criminal case upon which the defendant has the burden of proof. Many of the cases can be explained upon the theory that the courts are continually using the term "burden of proof" in two very different senses: as the obligation to produce at least a preponderance in the evidence, and as indicating the pressure upon one at any stage of the trial to produce evidence to answer a prima facie case produced by evidence aided or unaided by a presumption of law. Many are quite beyond any effort at reconciliation.

One of the best discussions of this particular question may be found in Professor THAYER'S "PRELIMINARY EVIDENCE AT THE COMMON LAW." A good statement is found in Justice Harlan's opinion in *Davis v. United States,* 160 U. S. 469. Recent cases illustrating the confusion referred to are: *Collier v. State* (S. C.), 113 S. E. 213; *State v. Rosi* (Wash.), 208 Pac. 15; holding that defendant has the burden on the defense of alibi; *People v. Martin* (Ill.), 135 N. E. 404, holding that it is enough to defeat conviction that defendant create a reasonable doubt of his guilt; *People v. Spagnolr* (Calif.), 208 Pac. 185. V. H. L.